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FEDERAL ELECTION COMMISSION  
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FEDERAL ELECTION COMMISSION

Aaron Hedlund

Columbia, MO 65201

Complainant

v.

Patriots for America

1220 Poquoson Avenue

Poquoson, VA 23362

and

Adam McLain

24 Church Road

Poquoson VA 23362

Respondents

CELA

MUR 7064

**ANSWER OF FRANKLIN AND LEE, INC.**

This Firm represents Franklin and Lee, Inc. ("Franklin and Lee"), in connection with the above matter and we thank you for the opportunity to present this correspondence to demonstrate that no further action should be taken by the Federal Election Commission (the "Commission") against Franklin and Lee. This responds to the letter from the Commission directed to Franklin and Lee dated May 17, 2016. Franklin and Lee specifically denies any allegations that it violated the Federal Election Campaign Act of 1971, as amended (the "Act"), and answers further and responds as follows.

**A. The Commission Lacks Jurisdiction Because Complaint Does Not Name Franklin and Lee as a Respondent**

The Commission should take no further action against Franklin and Lee because Franklin and Lee was not named as a respondent in the Complaint and it therefore has no jurisdiction over

any purported violations by Franklin and Lee. 11 C.F.R. §111.4(d)(1) requires that a complaint “**clearly identify as a respondent** each person or entity who is alleged to have committed a violation” and only authorizes the Commission to proceed against “**each respondent**” by notifying the respondent “that the complaint has been filed, advis[ing] them of Commission compliance procedures, and enclos[ing] a copy of the complaint.” These regulations unquestionably permit the Commission to pursue proceedings *only* against those persons explicitly identified as respondents in the complaint.

In light of the constitutional concerns with protecting the fundamental rights of free political speech and assembly, the Commission’s regulatory authority to engage in investigations or enforcement proceedings against any person in connection with federal campaigning is strictly circumscribed. See Fed. Election Comm’n v. Machinists Non-Partisan Political League, 655 F.2d 380, 387 (D.C. Cir. 1981) (cert. denied 454 U.S. 897 (1981)) (“This novel extension of the Commission’s investigative authority warrants extra-careful scrutiny from the court because the activities which the FEC normally investigates differ in terms of their constitutional significance from those which are of concern to other federal administrative agencies whose authority relates to the regulation of corporate, commercial, or labor activities. ... Thus the highly deferential attitude which courts usually apply to business related [regulatory investigations] has no place where political activity and association never before subject to bureaucratic scrutiny form the subject matter being investigated”). In contrast to other federal agencies, the courts have affirmed that the Commission does not have broad investigative authority but is rather strictly confined to conducting investigations where specifically authorized by the Commission’s governing statutes and regulations. Id. (unlike federal agencies such as the FTC, SEC, or the Administrator of the Department of Labor’s Wage and Hour Division which “are vested with

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broad duties to gather and compile information and to conduct periodic investigations," the Commission "has no such roving statutory functions" and an investigation "may begin only if an individual first files a signed, sworn, notarized complaint" which complies with the regulatory mandates). As the Court of Appeals for the D.C. Circuit noted, "mere 'official curiosity' will not suffice as the basis for [Commission] investigations." Id.

The Commission may not proceed with an investigation or proceedings against Franklin and Lee because the regulations limit it to investigating complaints against individuals who are "clearly identif[ied] as respondents" in the complaint. 11 C.F.R. §§ 114(d)(1). Here, the Complaint does not identify Franklin and Lee as a Respondent.

**B. The Complaint Does Not Allege Facts Showing Any Violations of the Act By Franklin and Lee.**

The Commission should take no further actions because the complaint fails to state a claim for violations of the Act against Franklin and Lee. It is well-settled that the burden lies with the complainant to articulate and allege with specificity in the Complaint facts sufficient to make out a violation of the Act before the Commission may find cause to proceed. E.g. Nader v. Fed. Election Comm'n, 823 F. Supp. 2d 53, 60 (D.D.C. 2011) (affirming dismissal of complaint in MUR 6021 where the complainant did not provide specific facts sufficient to demonstrate that each respondent "made expenditures in coordination with the Kerry-Edwards Campaign" even though the complaint contained 575 pages of circumstantial evidence and noting further that "it is not the FEC's burden to fill in the necessary blanks in Nader's complaint"). The Commission has stated further that "unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true," and "purely speculative charges" ... "do not form an adequate basis to find reason to believe that a violation of the FECA has occurred." Statement of Reasons, Federal Election Commission, MUR 4960 (Hillary Rodham Clinton for Senate Exploratory

Committee, issued December 21, 2000). See, also, e.g. Factual and Legal Analysis, Federal Election Commission, MUR 6171/6172 (Cooney for Congress Committee) (dismissing complaint because “[w]ithout context or any other specific facts, this allegation is merely speculative and does not provide a sufficient threshold to support reason to believe findings”).

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The Complaint here fails to set forth specific facts sufficient to demonstrate a violation of the Act by Franklin and Lee. The Complaint alleges merely that Franklin and Lee made disbursements to Patriots for America (“PFA”) totaling \$84,250 and that Franklin and Lee’s address is the same as that of PFA’s treasurer Adam McClain (“McClain”). The United States Supreme Court in Citizens United v. FEC, 558 U.S. 310, 130 S.Ct. 876, 913, 175 L.Ed.2d 753 (2010), affirmed the constitutional right of corporations to contribute unlimited sums to independent expenditure-only political committees (so-called “super PACs”). The Complaint does not allege any facts demonstrating any improprieties by Franklin and Lee in making said contributions. Indeed, the “legal conclusions” advanced by the complainant do not relate at all to any alleged actions of Franklin and Lee.

**C. The Complaint Must Be Dismissed as to Franklin and Lee Because It Does Not Provide Sufficient Notice of the Allegations Against It.**

Requiring Franklin and Lee to respond to this Complaint would violate its due process rights because the Complaint does not fairly apprise it of what the company is being accused of doing unlawfully. In complaint generated matters such as this, the Act and the Commission’s regulations require the Commission to provide notice of the claims and allegations to respondents identified in a Complaint by forwarding a copy of the Complaint to them. It is the Complaint itself which identifies those who have allegedly violated the act and specifies the factual bases of the alleged violations, and it is the forwarding of the Complaint by the

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Commission which provides detailed notice of the grounds for the violations alleged. The procedure is designed to provide clear notice of the allegations in order to afford respondents a fair opportunity to respond before the Commission determines whether there is cause to proceed further. 52 U.S.C §30109(a)(1); 11 C.F.R. §§ 111.5 & 111.6.<sup>1</sup> “The notice procedures set out in Section [30109(a)(1)] are for the benefit of those [alleged to have] violated the Act.” Nader v. Fed. Election Comm'n, 823 F. Supp. 2d 53, 68 (D.D.C. 2011). Such notice is a precondition to the Commission proceeding and a matter must be dismissed in the absence of strict compliance with the notice requirements.

The MUR must be dismissed against Franklin and Lee because there are no specific allegations against it to which it can be fairly expected to respond. Franklin and Lee is being asked unfairly to defend itself against unknown and un-asserted claims—left to guess at what the complainant is claiming the company did wrong. Neither the Act nor the Commission’s regulations, however, authorizes the Commission to institute an investigation against a respondent who has not first been provided with “a clear and concise recitation of the facts which describe a violation of a statute or regulation” and a fair opportunity to address those allegations. 11 C.F.R. §§ 111.4 – 111.6. This has not occurred.

It is fundamental that due process requires, at minimum, notice of the charges leveled against a subject and a fair opportunity to respond. In re Gault, 387 U.S. 1, 33, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); Amsden v. Moran, 904 F.2d 748, 753 (1st Cir. 1990) (cert. den., 498 U.S. 1041, 111 S. Ct. 713 (1991)) (“The essentials of procedural due process comprise notice of

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<sup>1</sup> In non-complaint generated matters, the Commission’s procedures require the Commission to send notice to the respondent “setting forth the basis of the referral and potential violations of the Act and/or Commission regulations that arise based on the referral.” Fed. Reg. Vol 74, No. 148, p. 38617.

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the charges and a reasonable chance to meet them.”); U.S. v. Baker, 807 F.2d 1315, 1323 (6th Cir. 1986) (“One of the most fundamental requirements of due process is that an individual must receive adequate notice of the charges or claims being asserted against him.”). “Notice, to comply with due process requirements, ... must set forth the alleged misconduct with particularity.” In re Gault, 387 U.S. at 33. “[D]ue process notice contemplates specifications of acts or patterns of conduct, not general, conclusory charges unsupported by specific factual allegations.” Spinelli v. City of New York, 579 F.3d 160, 171-72 (2d Cir. 2009). Indeed, the Commission’s regulations are designed to ensure that respondents are given adequate notice of the allegations against them, by requiring complainants to provide “a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction.” 11 C.F.R. § 111.4.

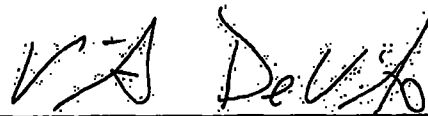
Where the Complaint here does not set forth *any* facts describing a violation of the Act by Franklin and Lee, name Franklin and Lee as respondent, or even identify the statutory or regulatory provisions it allegedly violated, the most basic due process requirements have not been fulfilled. As such, the Complaint must be dismissed as to Franklin and Lee.

**WHEREFORE**, Franklin and Lee respectfully requests that the Commission Dismiss the Complaint against it, and that no further action be taken.

Respectfully Submitted:

**Franklin and Lee, Inc.**

By its counsel:

A handwritten signature in black ink, appearing to read "V-A DeVito", written over a horizontal line.

Vincent DeVito

Joshua Lewin

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Dated: August 8, 2016